A

Nancy Simon d/o SP Simon v Peninsular Park Sdn Bhd

B

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S3-22–520 OF 1998
MOHD HISHAMUDIN J
22 JANUARY 2008

C

Contract — Specific performance — Sale and purchase agreement — Plaintiff paid 50% of purchase price — Failure to complete and deliver vacant possession — Whether plaintiff entitled to a refund of purchase price paid — Specific Relief Act 1950 s 18(2), (4)

D

Damages — Assessment — Accuracy — Market value as at date of judgment — Comparison method — Valuer did not personally inspect property at time of preparation of valuation report — Whether valuation report ought to be accepted by court

E

F

G

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I

The plaintiff filed an action against the defendant for specific performance of a sale and purchase agreement ('the agreement') entered into between the plaintiff (as purchaser) and the defendant (as vendor) for the purchase of a bungalow lot ('Lot 127') for the sum of RM150,372. The plaintiff paid RM75,186 towards the purchase price. The defendant/developer failed to deliver vacant possession of the lot within the time frame as prescribed in the agreement. By consent of both parties, the trial proceeded to establish the issue of liability first and at the conclusion, the learned judge was satisfied that the defendant had breached the agreement by failing to complete the development project and to deliver to the plaintiff the bungalow lot that she had purchased and entered judgment in favour of the plaintiff on the issue of liability on 18 March 2005. However, the learned judge did not decree specific performance but instead awarded the plaintiff damages in lieu of specific performance and directed that damages be assessed by the court. By consent of the parties, it was ordered that the material date for the purpose of the valuation of Lot 127, for the purposes of the assessment of damages, was to be the date of the judgment made on 18 March 2005 and parties were directed to file valuation reports. The plaintiff filed a valuation report prepared by a qualified valuer. The valuer was of the opinion that the market value of Lot 127 was RM400,000 as at 18 March 2005. The defendant did not file a valuation report. The defendant claimed that the report should not be accepted as the valuer did not personally inspect the property at the time of making the report.

Held:

(1) As the purchase price of Lot 127 was RM150,372, the loss suffered by the plaintiff was the difference between the market value of the property as at 18 March 2005 (ie RM400,000) and the purchase price (ie RM150,372), and the difference was RM249,628 (see para 7).

(2) The plaintiff, pursuant to the agreement, had paid the defendant a sum of RM75,186 as part payment towards the purchase price. Although the plaintiff had pursuant to the present assessment of damages, already been awarded a sum of RM249,628, following the case of *Central Malaysia Development Co Ltd v Chin Pak Chin* [1967] 2 MLJ 174, she was also entitled to a refund of the amount of RM75,186. The rationale was this: the plaintiff paid RM75,186 for something they never got, and hence must be refunded this amount (see para 8).

(3) Although the valuer did not inspect the property on the 'inspection date' of 4 October 2005, nevertheless he was familiar with the surroundings of the property in question and he had subsequently inspected the property on 7 June 2006 and stood by his report. In the light of these facts and also of the fact that the lot was merely a vacant bungalow lot with no building on it, and considering that the defendant did not tender any expert opinion on the value of Lot 127, the opinion of the valuer ought to be accepted by the court (see para 16).

[Bahasa Malaysia summary

Plaintif telah memfailkan satu tindakan terhadap defendan untuk pelaksanaan spesifik satu perjanjian jualbeli ('perjanjian tersebut') yang telah dimasuki antara plaintif (sebagai pembeli) dan defendan (sebagai penjual) untuk membeli sebuah lot banglo ('Lot 127') untuk sejumlah RM150,372. Plaintif telah membayar RM75,186 terhadap harga belian. Defendan/pemaju telah gagal menyerah milikan kosong lot tersebut dalam jangka masa yang ditetapkan dalam perjanjian tersebut. Dengan persetujuan kedua-dua belah pihak, perbicaraan diteruskan untuk membuktikan isu liabiliti terlebih dahulu dan pada kesimpulannya, hakim yang bijaksana telah berpuas hati bahawa defendan telah melanggar perjanjian tersebut kerana gagal untuk menyiapkan projek pembangunan tersebut dan untuk menyerah kepada plaintif lot banglo yang beliau telah beli dan memasuki penghakiman menyebelahi plaintif atas isu liabiliti pada 18 Mac 2005. Namun, hakim yang bijaksana tidak mendekrikan pelaksanaan spesifik tetapi sebaliknya mengawardkan plaintif ganti rugi menggantikan pelaksanaan spesifik serta mengarahkan agar ganti rugi ditaksirkan oleh mahkamah. Melalui persetujuan kedua-dua pihak, adalah diperintahkan bahawa tarikh matan bagi tujuan penilaian Lot 127, bagi tujuan penaksiran ganti rugi tersebut,

adalah tarikh penghakiman disampaikan pada 18 Mac 2005 dan kedua-dua pihak telah diarahkan untuk memfailkan laporan-laporan penilaian. Plaintif telah memfailkan satu laporan penilaian yang telah disediakan oleh penilai bertauliah. Penilai tersebut berpendapat bahawa nilai pasaran Lot 127 adalah RM400,000 setakat 18 Mac 2005. Defendan tidak memfailkan satu laporan penilaian. Defendan mendakwa bahawa laporan itu tidak patut diterima kerana penilai tersebut tidak secara sendiri memeriksa hartanah tersebut pada masa membuat laporan tersebut.

Diputuskan:

(1) Memandangkan harga belian Lot 127 adalah RM150,372, kerugian yang dialami oleh plaintif adalah perbezaan antara nilai pasaran hartanah setakat 18 Mac 2005 (iaitu RM400,000) dan harga belian (iaitu RM150,372), dan perbezaannya adalah RM249,628 (lihat perenggan 7).

(2) Plaintif berikutan perjanjian jual beli telah membayar kepada defendan wang sejumlah RM75,186 sebagai sebahagian pembayaran terhadap harga belian. Walaupun menurut penaksiran ganti rugi semasa, plaintif telahpun diawardkan sejumlah RM249,628, mengikut kes *Central Malaysia Development Co Ltd v Chin Pak Chin* [1967] 2 MLJ 174, beliau juga berhak mendapat balik jumlah RM75,186 ini. Rasionalnya adalah ini: plaintif telah membayar RM75,186 untuk sesuatu yang mereka tidak pernah dapat, dan justeru itu hendaklah membayar balik jumlah ini (lihat perenggan 8).

(3) Walaupun penilai tidak memeriksa hartanah tersebut pada 'inspection date' 4 Oktober 2005, namun demikian beliau biasa dengan keadaan sekeliling hartanah yang dipersoalkan dan beliau telahpun memeriksa hartanah tersebut pada 7 Jun 2006 dan tetap dengan laporannya. Berdasarkan fakta-fakta berikut dan juga hakikat bahawa lot tersebut hanya sebuah lot banglo tanpa apa-apa bangunan di atasnya, dan mengambilkira bahawa defendan tidak menenderkan sebarang pendapat pakar berhubung nilai Lot 127, pendapat penilai tersebut patut diterima oleh mahkamah (lihat perenggan 16).]

Notes

For cases on accuracy of damages assessment, see 6 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 263–264.

For cases on sale and purchase agreement, see 3(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 5111–5114.

Cases referred to

Central Malaysia Development Co Ltd v Chin Pak Chin [1967] 2 MLJ 174 (folld)

Legislation referred to

Specific Relief Act 1950 s 18(2), 18(4)

Conrad Young (Sivananthan) for the plaintiff.
Dennis Appaduray (Dennis Nik & Wong) for the defendant.

Mohd Hishamudin J:

[1] This is action by the plaintiff against the defendant for the specific performance of a sale and purchase agreement ('the agreement') entered into between the plaintiff (as purchaser) and the defendant (as vendor). Pursuant to the agreement, the plaintiff paid RM75,186 towards the purchase of the bungalow lot ('Lot 127'); the full purchase price being RM150,372. The defendant/developer failed to deliver vacant possession of the lot within the time frame as prescribed in the sale and purchase agreement.

[2] By consent of both parties, the trial proceeded first on the issue of liability only. At the conclusion of the trial on the issue of liability, I found for the plaintiff as I was satisfied that the defendant had breached the sale and purchase agreement by failing to complete the development project and to deliver to the plaintiff the bungalow lot that she had purchased. Judgment in favour of the plaintiff (on the issue of liability) was entered on 18 March 2005. However, based on the peculiarity of the facts, I did not decree specific performance: instead, invoking s 18(2) of the Specific Relief Act 1950, I awarded the plaintiff damages in lieu of specific performance. Pursuant to s 18(4) of the Specific Relief Act 1950, I directed that damages be assessed by the court.

[3] On 22 July 2005, at the commencement of the hearing for the assessment of damages, by consent of parties, I made an order that the material date for the purpose of the valuation of Lot 127, for the purposes of the assessment of damages, is to be the date of the judgment made on 18 March 2005. I directed for valuation reports to be filed by the respective parties.

[4] Only the plaintiff filed a valuation report. The defendant did not. The report was prepared by a qualified valuer, Mr Ooi Yew Hock of Knight Frank Ooi & Zaharin Sdn Bhd. The defence was the accorded the opportunity to cross-examined Mr Ooi on his valuation report.

[5] Mr Ooi in his report and in arriving at the opinion had regard to the following:

(a) Lot 127 was valued on the assumption of it having been delivered in accordance with the defendant's obligations under the sale and purchaser agreement, that is to say, with the necessary basic infrastructure for the development project serving Lot 127.

(b) The judgment date of 18 March (on the issue of liability) was used as the date of valuation.

(c) The location of Lot 127 together with its surroundings was properly identified by the necessary location plans.

(d) The description of Lot 127 and what the defendant was obliged to deliver according to the principal and supplementary sale and purchase agreements were properly identified and taken into account.

(e) The various and other necessary searches and investigations were also conducted.

The accuracy of all these matters was not challenged by the defendant.

[6] In determining what would have been the market value of Lot 127 on 18 March 2005, Mr Ooi adopted the comparison method. He used and applied four comparables. He made the necessary adjustments (downwards or upwards adjustments, as the case may be) taking into account pertinent factors such as time, size, location, and the legal nature of the ownership (for example freehold or leasehold). Mr Ooi then arrived at the market value of RM20 per square foot and hence his opinion of RM400,000 as the value of Lot 127 as at 18 March 2005.

[7] As the purchase price of Lot 127 was RM150,372, I made a finding that the loss suffered by the plaintiff is the difference between the market value of the property as at 18 March 2005 (that is, RM400,000) and the purchase price (that is RM150,372), and the difference is RM249,628. I therefore made an order that the defendant do pay the plaintiff the sum of RM249,628 as damages/compensation.

[8] It is to be recalled that the plaintiff pursuant to the sale and purchase agreement had paid the defendant a sum of RM75,186 as part payment towards the purchase price. The question now arise as to whether she is also entitled to a refund of this sum, considering that she has, pursuant to the present assessment of damages, already been awarded a sum of RM249,628.

I am of the view that she is also entitled to a refund of this amount of RM75,186. The rationale is this: the plaintiffs paid RM75,186 for something they never got, and hence must be refunded this amount. In so ruling, I am guided by the case of *Central Malaysia Development Co Ltd v Chin Pak Chin* [1967] 2 MLJ 174. In this case, Ajaib Singh J (as he then was) said (at pp 177–178):

> In the result the plaintiffs are entitled to recover the sum of $60,000 which they have paid as deposit on the date of the agreement together with a reasonable rate of interest, which I fix at 6% per annum, and they are entitled to recover by way of damages for loss of bargain a sum of $56,725. Accordingly there will be judgment for the plaintiffs for $116,725 with interest on $60,000 at 6% per annum from 1 July 1964 to date and on the aggregate sum of 6% per annum from today to date of realisation.

[9] Thus the total amount of damages awarded to the plaintiff was RM249,628 plus RM75,186, and this amounts to RM324,814.

[10] I awarded interest of 8% per annum from the date of judgment on liability (that is, 18 March 2005) until full payment on the sum of RM324,814.

[11] I also awarded costs to the plaintiff in respect of the assessment of damages proceedings.

[12] Finally, there is one matter. Now, Mr Ooi, the plaintiff's valuer, did not personally inspect Lot 127 on the date stated in the valuation report as the 'date of inspection', that is, 4 October 2005. However, he did subsequently inspect the lot in the morning of 7 June 2006 (the second day of the assessment trial). Learned counsel for the defendant, Mr Dennis Appaduray, submitted that by reason of this failure to inspect by Mr Ooi himself, his report and opinion must be rejected by the court.

[13] Now, although Mr Ooi did not inspect Lot 127, he, however, gave evidence that he was familiar with the location and surroundings of Lot 127; that he inspected the lot in the morning of 7 June 2006; and that, after his personal inspection on 7 June 2006 to update himself on the current situation, he stood by his analysis as contained in his report. Mr Ooi, in his evidence, appears to imply that the inspection on 4 October 2005 was done by his assistant, one Kent Chan who has a degree in valuation but was not a registered valuer; and that photographs in the valuation report were taken by

Ken Chan at the time when the inspection was done by the latter. In this regard, I shall produce the relevant portion of the evidence of Mr Ooi given during cross-examination:

> Q: Did you personally do this inspection?
>
> A: No.
>
> Q: If you did not personally do this inspection, how are you able to describe the position of the said property, the location, etc?
>
> A: I am familiar with the location and the surroundings; and the report was prepared with the help of a valuer in my firm.
>
> Q: Who would that be?
>
> A: Mr Ken Chan.
>
> Q: So your report is based on a data and information by another party to you?
>
> A: A part of it yes.
>
> Q: What were the date and information in this report that were obtained or supplied by Kent Chan?
>
> A: Data like property description, planning, search and sales date.

[14] In this regard, Encik Conrad Young, learned counsel for the plaintiff, referred to the 'Manual of Valuation Standards' of the Board of Valuers, Appraisers and Estate Agents, Malaysia, where at paragraph 6.2.2 the manual states:

> Where the Valuer does not himself inspect the property, he must be familiar with the locality, the type of property and the relevant market condition to enable him to verify his Designated Assistant's inspection report and findings. (The person inspecting the property must sign and date his inspection report).

[15] In the present case, however, there is no inspection report signed and dated by the said Ken Chan was tendered. Thus the requirement:

> (The person inspecting the property must sign and date his inspection report).

has not been met.

[16] Be that as it may, it is my finding that, although Mr Ooi did not inspect the property on the 'inspection date' of 4 October 2005, nevertheless he was familiar with the surroundings of the property in question and he had subsequently inspected the property on 7 June 2006 and stood by his report.

In the light of these facts and also of the fact that the lot is merely a vacant bungalow lot with no building on it, and considering that the defendant did not tender any expert opinion on the value of Lot 127, I am of the view that the opinion of Mr Ooi ought to be accepted by the court.

[17] Damages of RM324,814 awarded with costs and interest at 8% per annum with effect from 18 March 2005.

Order accordingly.

Reported by Navit Kaur Randhawa